

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE: NATIONAL PRESCRIPTION  
OPIATE LITIGATION

THIS DOCUMENT RELATES TO:

TRACK THREE

MDL No. 2804

Case No. 17-md-2804

Judge Dan Aaron Polster

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO ADMIT PROCESSED  
ARCOS DATA AND DEFENDANTS' DISPENSING DATA**

Defendants submit this response to Plaintiffs' Motion to Admit Processed ARCOS Data and Defendants' Dispensing Data (ECF No. 4070). Plaintiffs previously represented that the processed ARCOS data could not be admitted, and that they would instead seek to admit summary charts about the data through a witness, Dr. Craig McCann, who could be cross-examined at trial. Dr. McCann has testified, and plaintiffs did not seek to admit or to lay a foundation for the ARCOS data or any summary charts about that data through him. Plaintiffs also have not elicited testimony about the ARCOS data or any shipments in the ARCOS data from any other witness. No grounds exist to allow plaintiffs to admit the ARCOS data now, without a witness. As plaintiffs, the Special Master, and the Court previously recognized, admitting the ARCOS data without a sponsoring witness would be improper.

**First**, plaintiffs' motion *in limine* regarding summary charts represented that "it would not be possible to admit" the processed ARCOS data and cited cases holding that, when there is voluminous data, summaries and not the data should be admitted into evidence. ECF No. 3830 at 10-11. The Court agreed the ARCOS data was too voluminous to be admitted into evidence. ECF

No. 3967 at 7. But plaintiff did not seek to admit summary charts about the data through Dr. McCann or any other witness.

**Second**, plaintiffs' motion *in limine* also promised that any evidence related to the processed ARCOS data would be introduced "as part of Dr. McCann's testimony." ECF No. 3830 at 16. Under a heading, "Dr. McCann will be available for cross-examination in compliance with *Bray's* fifth factor," plaintiffs stated: "[T]he summaries will be properly introduced as part of Dr. McCann's testimony, as the person who prepared the charts. Defendants will be able to cross-examine him as to any issue." *Id.* The Court relied on this representation in granting plaintiffs' motion, stating:

Under *Bray*, before summary charts may be admitted into evidence, the proponent must lay a proper foundation by presenting 'the testimony of the witness who supervised its preparation.' *Bray*, 139 F.3d at 1110. ***Plaintiffs assure the summaries will be properly introduced as part of McCann's testimony, just as they did in Track Two.*** Motion at 6. Defendants will have the opportunity to cross-examine McCann and refute Plaintiffs' evidence with their own.

ECF No. 3967 at 8-9 (emphasis added). But Dr. McCann offered no testimony about the processed ARCOS data or any shipments to Lake and Trumbull Counties when he testified at trial. Nor has any other witness.

**Third**, plaintiffs raised this issue at the parties' August 18, 2021, discovery conference with Special Master Cohen. Consistent with the Court's subsequent ruling, Special Master Cohen explained that if the processed ARCOS data and/or the summary charts about the data were to be admitted, plaintiffs would have to lay a proper foundation through Dr. McCann and that defendants would have an opportunity to cross-examine Dr. McCann on the data and/or charts. Ex. A, Hr'g Tr. at 88:24-89:4 ("But also, to the extent at trial, you're going to present to the jury what it is – first of all, what ARCOS data is and what your experts did with it. That's just the normal presentation of evidence."), 89:23-90:6 (explaining that defendants would have an opportunity to

cross-examine Dr. McCann on what he did at trial). But, again, plaintiffs made no attempt to lay a foundation for the processed ARCOS data through Dr. McCann or any other witness.

During Dr. McCann's testimony, plaintiffs did admit certain summary charts based on defendants' *dispensing* data. Consistent with their representations discussed above, plaintiffs did not seek to admit the processed dispensing data itself. The data should not be admitted now. The data is too voluminous to be examined by the jury, consisting of millions of different transactions. And the admission of such patient-level data would raise concerns about the protected health information of the residents of Lake and Trumbull Counties.

In short, both defendants and the Court relied on plaintiffs' representations that (a) the ARCOS and dispensing data could not and would not be admitted; (b) plaintiffs, instead, would seek to admit summary charts; and (c) plaintiffs would lay a foundation for the processed data and the charts through Dr. McCann, and defendants would have an opportunity to cross-examine him on those matters. Plaintiffs' current motion ignores these representations and the Court's and defendants' reliance on them. Defendants will work with plaintiffs on these issues as the Court has instructed, but plaintiffs' motion should be denied.

October 25, 2021

Respectfully submitted,

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